



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 17, 2010

Ms. Lisa Adelman  
Legal Counsel  
Alamo Regional Mobility Authority  
1222 North Main Avenue, Suite 1000  
San Antonio, Texas 78212

OR2010-07030

Dear Ms. Adelman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 379501.

The Alamo Regional Mobility Authority (the "authority") received a request for correspondence between a named individual, authority staff, and authority lobbyists from October 2008 to June 2009, and a named individual from October 2008 to the present.<sup>1</sup> You state you have released some information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

Initially, you state some of the requested information was the subject of three previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-05924, 2009-05926, and 2009-13913. You state the law, facts and circumstances have not changed since the issuance of these prior rulings. Therefore, to the extent the information at issue is identical to the information previously requested and ruled upon by this office, the authority must withhold or release the information in accordance with Open

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<sup>1</sup> You inform us that the authority sought and received clarification of the information requested. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Records Letter Nos. 2009-05924, 2009-05926, and 2009-13913. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously requested and ruled upon by this office, we will address your arguments.

You state a portion of Exhibit D is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your claim that the attorney fee bills are privileged under Texas Rule of Evidence 503.

Rule 503 enacts the attorney-client privilege, providing in relevant part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1993, no writ.) (denial in its entirety under Texas Rule of Evidence 503).

You state that the submitted attorney fee bills document communications between the authority's attorneys and their clients that were made in connection with the rendition of professional legal services to the authority. You also state that the communications were intended to be and have remained confidential. We note, however, that you have failed to identify some of the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (stating that predecessor to the Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). However, upon review, we have been able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, the authority may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, we find that you have failed to demonstrate that the remaining information documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information, and it may not be withheld on this basis.

You claim the remaining information in Exhibit D, as well as Exhibits B and C are subject to section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state that the remaining information consists of communications between authority employees and authority attorneys. You also state portions of the communications are with an entity the authority shares a joint defense in connection with a lawsuit filed against both parties. You also state that some of the parties included in the communications have common interests with the authority regarding legislative issues. *See generally* Tex. R. Evid. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You further state that these communications were intended to be confidential. Based upon your representations and our review, we conclude that the authority may withhold Exhibits B and C, and the information not subject to section 552.022(a)(16) in Exhibit D under section 552.107(1). However, we note that one of the individual e-mails contained in one of the submitted e-mail strings consists of a communication with non-privileged or unidentified parties. To the extent this non-privileged e-mail, which we have marked, exists separate and apart from the otherwise privileged e-mail strings, it may not be withheld under section 552.107.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if

factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the information at issue pertains to discussions with the Texas Department of Transportation (the "department") regarding the development of transportation projects. You state the authority and the department share a privity of interest in the development of transportation projects in the San Antonio region. You also seek to withhold information pertaining to potential legislation. You state the various regional mobility authorities around the state share a privity of interest as similarly situated public entities engaged in the joint pursuit of legislation. You further state the authority and five other regional mobility authorities are represented by the same law firm and share a common legal interest. Finally, you assert the authority is seeking to withhold communications with representatives of the VIA Metropolitan Transit ("VIA"). You state the authority and VIA share a privity of interest regarding proposed consolidation efforts. In addition, you inform us that some of the submitted documents constitute draft documents concerning policy matters that were created by authority officials. Having considered your arguments and representations and reviewed the information at issue, we agree that the authority may withhold the information we have marked in Exhibit E under section 552.111 of the Government Code. Additionally, to the extent the draft documents we have marked will be released to the public in their final

form, they may also be withheld under section 552.111 of the Government Code. However, we note the remaining information you have marked consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, the authority may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We note the remaining information contains bank account and routing numbers. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”<sup>2</sup> Gov’t Code § 552.136(b). Therefore, the authority must withhold the information we have marked pursuant to section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. You do not inform us the owners have consented to release. Therefore, the authority must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners consent to release.

In summary, the authority may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The authority may withhold Exhibits B and C, and the information not subject to section 552.022(a)(16) in Exhibit D under section 552.107(1). The authority may withhold the information we have marked in Exhibit E under section 552.111 of the Government Code. Additionally, to the extent the draft documents we have marked will be released to the public in their final form, they may also be withheld under section 552.111 of the Government Code. The authority must withhold the information we marked under section 552.136. The authority must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners consent to release.<sup>3</sup> The remaining information must be released.

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<sup>2</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup> We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 and e-mail addresses under section 552.137 without the necessity of requesting an attorney general decision.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'CS', with a long, sweeping horizontal flourish extending to the right.

Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/rl

Ref: ID# 379501

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)